

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
Apr 17, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELLE P., O/B/O L.P.,
Plaintiff,
-vs-
MARTIN O'MALLEY, Commissioner of
Social Security,¹
Defendant.

No. 2:23-CV-0146-WFN
ORDER GRANTING
PLAINTIFF'S MOTION
ECF Nos. 8, 14

Pending before the Court are Plaintiff's Opening Brief and the Commissioner's Brief in response. ECF Nos. 8, 14. Attorney Christopher H. Dellert represents Michelle P. (Plaintiff), on behalf of L.P., a minor (Claimant); Special Assistant United States Attorney Thomas E. Chandler represents the Commissioner of Social Security (Defendant). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's motion, **DENIES** Defendant's motion, and **REMANDS** the matter for further proceedings under sentence four of 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff, on behalf of Claimant, filed an application for benefits on July 27, 2020, alleging disability since July 1, 2020. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) Marie Palachuk held a hearing on June 8, 2022, and issued an unfavorable decision on June 27, 2022. Tr. 15-27. The Appeals Council

¹ This action was originally filed against Kilolo Kijakazi in her capacity as the acting Commissioner of Social Security. Martin O'Malley is substituted as the defendant because he is now the Commissioner of Social Security. *See* Fed. R. Civ. P. 25(d).

1 denied review on March 1, 2023. Tr. 1-6. Plaintiff appealed this final decision of the
 2 Commissioner on May 12, 2023. ECF No. 1.

3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in medical
 5 testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir.
 6 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a
 7 reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087
 8 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by
 9 substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097
 10 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less
 11 than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant
 12 evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson*
 13 *v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S.
 14 197, 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the
 15 Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098; *Morgan*
 16 *v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence
 17 supports the administrative findings, or if conflicting evidence supports a finding of either
 18 disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812
 19 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial
 20 evidence will be set aside if the proper legal standards were not applied in weighing the
 21 evidence and making the decision. *Brawner v. Sec'y of Health and Human Services*, 839
 22 F.2d 432, 433 (9th Cir. 1988).

23 **SEQUENTIAL EVALUATION PROCESS**

24 The Commissioner has established a three-step sequential evaluation process for
 25 determining whether a child is disabled. 20 C.F.R. § 416.924. At step one, it must be
 26 determined whether the claimant is performing substantial gainful activity. *Id.* If the
 27 claimant is not performing substantial gainful activity, at step two, it must be determined
 28 whether the claimant has a "severe" medically determinable impairment or combination

1 thereof. *Id.* If the claimant has a severe impairment or combination of impairments that
2 meets the duration requirement, it must be determined at step three whether that impairment
3 meets, medically equals, or functionally equals a listed impairment in 20 C.F.R. § 404,
4 Part B, Appendix 1, Subpart P. *Id.* If the child's impairment meets or medically equals a
5 listed impairment, then the claimant will be found disabled. If the impairment does not meet
6 or medically equal a listed impairment, it must be determined whether the impairment
7 *functionally* equals a listed impairment by assessing the child's limitations in six broad areas
8 of functioning called "domains." The domains include the following: (1) acquiring and
9 using information, (2) attending and completing tasks, (3) interacting and relating with
10 others, (4) moving about and manipulating objects, (5) caring for oneself, (6) health and
11 physical well-being. 20 C.F.R. § 416.926a. The claimant's impairment will be considered
12 functionally equivalent if the claimant has "marked" limitations in two domains, or
13 "extreme" limitations in one domain. *Id.* A determination of functional equivalence is the
14 responsibility of the state agency medical or psychological staff at the initial and
15 reconsideration levels, of an ALJ at the hearing level, and of the Appeals Council at that
16 level. 20 C.F.R. § 416.926a(n). If a claimant meets all three steps and has an impairment
17 that meets, medically equals, or functionally equals a listed impairment for the required
18 duration, he or she will be found disabled.

ADMINISTRATIVE FINDINGS

20 On June 27, 2022, the ALJ issued a decision finding Claimant was not disabled as
21 defined in the Social Security Act. Tr. 15-27.

22 At step one, the ALJ found Claimant was a school-age child and had not engaged in
23 substantial gainful activity since July 27, 2020, the application date. Tr. 16.

24 At step two, the ALJ found the Claimant has the following severe impairments:
25 dyslexia; spelling disorder; and hearing loss, left ear. Tr. 16.

26 At step three, the ALJ found Claimant does not have an impairment or combination
27 or impairments that meets or equals the severity of a listed impairment. Tr. 16. As to
28 functional equivalence, the ALJ found Plaintiff had less than marked limitations in acquiring

1 and using information, attending and completing tasks, caring for himself, and health and
 2 physical well-being; and no limitations in interacting and relating with others and moving
 3 about and manipulating objects. Tr. 18. The ALJ thus determined Plaintiff's impairments
 4 did not result in two marked limitations or one extreme limitation in any of the six domains.
 5 Tr. 27.

6 The ALJ thus concluded Plaintiff has not been disabled since the application date.
 7 Tr. 27.

8 ISSUES

9 The question presented is whether substantial evidence supports the ALJ's decision
 10 denying benefits and, if so, whether that decision is based on proper legal standards.

11 Plaintiff raises the following issues for review: (A) whether the ALJ failed to develop
 12 the record; (B) whether the ALJ erred by taking expert testimony before taking the testimony
 13 of Claimant and Plaintiff; (C) whether the ALJ erred at step two; (D) whether the ALJ erred
 14 in evaluating the medical evidence; and (E) whether the ALJ erred by discounting Plaintiff's
 15 testimony. As discussed below, because the Court concludes the ALJ erred with respect to
 16 the first issue, it is not necessary to reach Plaintiff's remaining assignments of error.

17 DISCUSSION

18 Plaintiff contends the ALJ erred by not having a complete case review by an
 19 appropriate medical expert, in accordance with *Howard ex rel. Wolff v. Barnhart*, 341 F.3d
 20 1006 (9th Cir. 2003) and Social Security Acquiescence Ruling 04-1(9). ECF No. 8 at 4-6.
 21 For a disability claim of an individual under eighteen years old, the ALJ "shall make
 22 reasonable efforts to ensure that a qualified pediatrician or other individual who specializes
 23 in a field of medicine appropriate to the disability of the individual (as determined by
 24 the Commissioner of Social Security) evaluates the case of such individual." 42 U.S.C.
 25 § 1382c(a)(3)(I). The pediatrician or other appropriate specialist must base their evaluation
 26 on the record in its entirety. *Howard*, 341 F.3d at 1014. To satisfy this requirement, the
 27 ALJ may rely on a case evaluation made by a state agency consultant that is already in the
 28 record, or the ALJ may rely on the testimony of a medical expert. Social Security

1 Acquiescence Ruling (AR) 04-01(9), *available at* 2004 WL 875081. When the ALJ relies
 2 on the case evaluation made by a state agency consultant, "the record must include the
 3 evidence of the qualification of the State agency ... consultant." *Id.*

4 It is undisputed that the ALJ did not "ensure that a qualified pediatrician ...
 5 evaluate[d]" Claimant's case. 42 U.S.C. § 1382c(a)(3)(I); *see* ECF No. 14 at 5-6. The
 6 Commissioner also concedes that the State agency consultants, on whom the ALJ relied, did
 7 not review the entirety of the record, as "numerous records were developed after the date of
 8 the State agency consultants' reviews." ECF No. 14 at 6. The Commissioner further
 9 concedes "there is no additional information to determine whether their qualifications are
 10 appropriate to the instant case." *Id.* Nevertheless, the Commissioner contends such errors
 11 were harmless "as the ALJ complied with AR 04-1(9) by utilizing a medical expert at the
 12 hearing." *Id.* The Court disagrees.

13 As with the State agency consultants, it is not apparent that the testifying medical
 14 expert, Jay M. Toews, M.D., has the requisite statutory qualifications. *See* 42 U.S.C.
 15 § 1382c(a)(3)(I). While the record indicates Dr. Toews is a clinical and behavioral
 16 psychologist, *see* Tr. 27, 38-43, it does not indicate that he "specializes in a field of medicine
 17 appropriate to the disability" of Claimant. AR 04-1(9) (emphasis added); *see also Howard*,
 18 341 F.3d at 1014 (an "ALJ is required to make a reasonable effort to obtain a case evaluation,
 19 based on the record in its entirety, from a pediatrician or other *appropriate* specialist")
 20 (emphasis added). Importantly, an "individual who specializes in a field of medicine
 21 appropriate to the disability" of the child or an "appropriate specialist" are statutory and
 22 regulatory alternatives to a "pediatrician." *See* 42 U.S.C. § 1382c(a)(3)(I); AR 04-1(9). It
 23 is thus not apparent that Dr. Toews has the requisite qualifications to evaluate a *child's* claim.
 24 *Cf. Biden v. Nebraska*, 143 S. Ct. 2355, 2378 (2023) (Barrett, J., concurring) ("To strip a
 25 word from its context is to strip that word of its meaning.").

26 Resisting this conclusion, the Commissioner maintains, in a conclusory fashion, that
 27 the ALJ's use of Dr. Toews's testimony satisfied AR 04-1(9). This argument overlooks that
 28 the use of Dr. Toews's testimony to satisfy AR 04-1(9) was as inherently deficient as the

1 ALJ's use of the State agency consultants. The Commissioner offers no authority that would
2 compel the Court to depart from adhering to the plain meaning of the unambiguous statutory
3 and regulatory language at issue. *See, e.g., Robinson v. Shell Oil Co.*, 519 U.S. 337, 340-41
4 (1997); *United States v. Bucher*, 375 F.3d 929, 932 (9th Cir. 2004).

5 Accordingly, the Court finds the ALJ erred in failing to obtain a comprehensive case
6 evaluation by an appropriately qualified medical expert and this error was consequential.
7 Evaluation of the case as a whole by an appropriately qualified medical expert is critical to
8 the adjudicator's longitudinal understanding of Claimant's impairments and resulting
9 limitations. *See Howard*, 341 F.3d at 1014.

10 **CONCLUSION**

11 Having reviewed the record and the ALJ's findings, the Commissioner's final decision
12 is **REVERSED** and this case is **REMANDED** for further proceedings under sentence four
13 of 42 U.S.C. § 405(g). On remand, the ALJ shall call a qualified pediatrician or other
14 appropriately qualified medical specialist to review the case in its entirety and to reevaluate
15 the Domains and Listings. The ALJ shall also reconsider Claimant's subjective complaints,
16 each lay witness statement, and all the medical evidence of record, taking into consideration
17 any other evidence or testimony relevant to Claimant's disability claim. Accordingly,

18 **IT IS ORDERED** that:

- 19 1. Plaintiff's motion to reverse, filed August 3, 2023, **ECF No. 8**, is **GRANTED**.
20 2. Defendant's motion to affirm, filed November 27, 2023, **ECF No. 14**, is
21 **DENIED**.

22 The District Court Executive is directed to file this Order and provide a copy to
23 counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and the file shall
24 be **CLOSED**.

25 **DATED** this 17th day of April, 2024.

26 

27
28 WM. FREMMING NIELSEN
03-07-24 SENIOR UNITED STATES DISTRICT JUDGE